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778-720—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1061

WILLIAM GROSH AND MARIO GARCIA KOHLY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B 4a–7a) is reported at 342 F. 2d 141.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1965. On March 26, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including April 12, 1965. The petition for a writ of certiorari was filed on April 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for conspiring to counterfeit the currency of the Castro government in

Cuba and for possessing plates to make such currency, the Court properly charged the jury that no other group claiming to be the government of Cuba had the authority to print currency of the Castro government.

2. Whether the trial court improperly excluded evidence.

3. Whether the court erred in not instructing upon the defense of entrapment.

4. Whether plain error was committed in admitting into evidence statements of a defendant made prior to his preliminary hearing.

5. Whether petitioners were denied the effective assistance of counsel.

STATUTES INVOLVED

18 U.S.C. 11 provides:

> § 11. *Foreign government defined.*
>
> The term "foreign government", as used in this title, includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

18 U.S.C. 481 provides in pertinent part:

> § 481. *Plates or stones for counterfeiting foreign obligations or securities.*
>
> Whoever, within the United States except by lawful authority, controls, holds, or possesses any plate, stone, or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation,

> or uses such plate, stone, or other thing, or knowingly permits or suffers the same to be used in counterfeiting such foreign obligations, or any part thereof * * * [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioners Kohly and Grosh, together with Cecily Morrow and Robert Morrow,[1] were indicted in the Southern District of New York in a two count indictment charging conspiracy to print counterfeit 50 peso Republic of Cuba notes and possession without lawful authority of plates to print counterfeit 50 peso Republic of Cuba notes in violation of 18 U.S.C. 481 (1 R. 2–4). Petitioners were convicted after a jury trial (Tr. 854). Each was sentenced to imprisonment for a period of one year on each count, the sentences to run concurrently (Tr. 887).

The statement of facts in the petition does not differentiate the evidence presented by the government from the evidence for the defense. We summarize the evidence at the trial as follows:

(1) *The Government's Case:*

In the spring of 1960, petitioner Kohly, a Cuban exile, told Robert Morrow that he wanted to reproduce Cuban pesos which could be distributed by the underground in Cuba. Morrow prepared plates from which 10 peso notes were manufactured until August, 1961, when Castro changed the Cuban currency

[1] The Morrows pleaded *nolo contendere* in a case transferred to the District of Maryland pursuant to Rule 20, F.R. Crim. P. (Tr. 135, 713–714).

(2 R. 48–51). Morrow also supplied Kohly with some radio equipment for the Cuban underground (Tr. 195–198, 218–219).[2]

In May, 1963, Kohly arranged for Morrow to prepare plates for a 50 peso Cuban note and subsequently furnished him with $110 to buy materials (2 R. 35–36, 44–45). In July, 1963, Morrow advised Kohly that he needed a professional printer if the notes were to pass the scrutiny of the Cuban government (2 R. 45–46).

On July 24, 1963, Harris Martin, a Secret Service undercover agent, was introduced to petitioners by attorney J. Walter Scholz as a New York printer who might counterfeit Cuban pesos from plates. Kohly wanted Martin to invest $10,000 to finance the plates and other supplies. He said he was connected with the underground Cuban movement and that he was anxious to use these pesos to buy boats and weapons to support the underground movement. Martin stated an interest in printing only if he could make a profit. Kohly offered him a profit, saying the pesos would be sold to Cuban refugees in Florida before any would be dropped by air over Cuba. Martin said that this was a risky illegal enterprise. Kohly said that was the reason the return was high and that Martin need not worry because Kohly had discussed his plan with the C.I.A. and the F.B.I. who, Kohly said, were closing their eyes to the scheme.

[2] Morrow, who had designed and developed a unit of electronic equipment for the C.I.A. in February, 1962 (Tr. 199–201), denied that he told Kohly that he worked for the C.I.A. (2 R. 54). Earlier in 1958 and 1959 Morrow had done some secret work for the Navy Department (Tr. 213).

Kohly said that the protection he enjoyed from these agencies would cover Martin (Tr. 24–30, 35, 103–107). Petitioners agreed to arrange a meeting with the plate maker after Martin said he would not make any investment unless he saw the plates or talked to the plate-maker (Tr. 33–34).

On July 30, Kohly informed Martin that he no longer needed his financial assistance. He agreed to pay Martin $7,000 to print 40 million pesos, suggesting that Martin could receive more money if he would accept payment in Cuban pesos that Kohly would sell for him in Florida (2 R. 10–12).

On September 19, 1963, petitioners, Morrow, and Martin discussed plans for the production of the pesos. Morrow suggested that Martin obtain the paper through normal channels "as there would be nothing wrong with that" (2 R. 14–15, 38–39).

After Morrow turned the finished plates over to Grosh and to Kohly's son (2 R. 36–37), Kohly arranged to deliver the plates to Martin. They met on September 30, 1963, but Kohly claimed that he had left the plate-maker before the plates had been completed (2 R. 17–18). On October 1, 1963, they met again. When Martin ascertained that Kohly had the plates, he signalled other agents and Kohly was arrested. That night petitioner Grosh telephoned Morrow and told him to "get rid of the stuff" (2 R. 53, 55).

On November 21, 1963, Kohly appeared as a grand jury witness at his own request after being advised by his attorney. He acknowledged that he did not have either official or unofficial approval from any-

body in the United States Government for what he did. He denied telling Martin that the F.B.I. and the C.I.A. had approved his undertaking. He said that he told Martin that Morrow claimed to have discussed it with some government people who considered it a good idea because it would help overthrow Castro. Kohly testified that he did not have the consent of the Castro government to make the plates and produce the bill because "[w]e considered ourselves to be the government of Cuba" (Tr. 270–273).

(2) *The Defense:*

Petitioners testified on their own behalf and portions of Kohly's grand jury testimony were read. Kohly testified that he had united 96 organizations whose stated aim was the liberation of Cuba from Castro (Tr. 349–350). The grand jury testimony showed that in 1960, after arrangements had been made through Vice President Nixon, Kohly discussed with a C.I.A. agent methods by which Castro could be overthrown (Tr. 399–400); that in 1961 he turned over to the United States Government a 10 peso note, a plan for the unification of the Cuban exile forces and a proposed budget for Cuba; that on August 16, 1961, the note and the papers were returned to him (Tr. 382–385); and that Kohly thought he had the right to print Cuban money as the head of the Cuban government in exile (Tr. 396–397, 413–414). Kohly testified that Morrow would not make plates for him until Morrow obtained full clearance from the Secret Service and the C.I.A. and that Morrow informed him in August, 1963, that he had secured such clear-

ance (Tr. 389–390, 436–438, 553–557). Kohly also said that Martin told him that he had printed securities for foreign governments and the United States (Tr. 452–455). Petitioner Grosh testified that he was in effect a chauffeur for Kohly and had no knowledge of his activities (Tr. 593 *ff.*).

ARGUMENT

1. As the currency of a recognized foreign government, at peace with the United States, the currency of the Castro Cuban government is protected by the counterfeiting statutes. See *United States* v. *Arjona*, 120 U.S. 479. Thus, even if petitioners' claim to represent a government of Cuba in exile is accepted, they would not have had the right to print the currency of the Castro government. Nor are petitioners aided by 18 U.S.C. 11, upon which they rely. That section defines foreign government as "any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States." On petitioners' logic, their government in exile could at most print its own currency; it could not lawfully counterfeit the currency of a different recognized government. The trial judge therefore properly charged the jury (Pet. 9, footnote 3) that the "recognition by our government of the government of the Republic of Cuba, headed by Castro, * * * precludes any finding by our courts, and that would include the jurors, that any individual, group or person claiming to represent the government of the people of Cuba was a foreign government which had the sovereign right to print

and issue money on behalf of the Republic of Cuba, headed by Castro."[*]

2. The trial judge did not erroneously exclude evidence showing approval of portions of Kohly's plan by United States officials. The judge initially denied petitioners' proffers of evidence on the ground the offer did not show any authorization for the plates in question (2 R. 62–66; Tr. 355–361). This ruling was modified shortly thereafter to permit Kohly to explain his grand jury testimony, introduced by the government, in which Kohly admitted that he had no approval from the C.I.A. or F.B.I. (2 R. 68–69; Tr. 365–367) and this evidence came in (Tr. 399–400). Kohly testified that Morrow told him he had govern-

[*] Petitioners urge (Pet. 11–15) that they had "lawful authority" to print the currency of the Castro government. Insofar as this is a contention that, as an alleged government in exile, they had authority to counterfeit the Castro government's currency, we have shown in the text that it is erroneous. As to petitioners' argument that they had "lawful authority" flowing from the government of the United States to print Castro currency, petitioner Kohly himself, in his grand jury testimony, stated flatly that he "never" had "the blessings of the United States Government * * * for the work I've been doing," that he did not have "official or unofficial approval" and he further denied telling Martin that the F.B.I. and the C.I.A. had approved his undertaking. (Tr. 270–273.) In any event, petitioners do not suggest that they requested an instruction on this theory of defense.

Moreover, the evidence that the Secret Service does on occasion grant authority for foreign currency to be printed in the United States did not destroy the government's case, as petitioners imply. The purport of the testimony of Carnes (Tr. 290–292) is that such authority is granted when a domestic company contracts with a foreign government to produce its currency. Petitioners did not claim such authority.

ment clearance and that Martin said he had done printing for the United States and foreign governments. As to testimony concerning recognition of Kohly's group by Guatemala and steps to obtain recognition by other nations, this would at most have tended to show that petitioners considered themselves as constituting a government in exile, which, as we have shown, did not bear on petitioners' guilt in imitating the currency of the recognized government of Cuba.[4]

3. Under Kohly's own evidence there was no entrapment and therefore no error in not instructing in that issue. His testimony showed that before Martin (the undercover agent) came into the case, Kohly himself had asked Morrow to prepare the plates. Kohly's statement that Martin asked to meet him in New York does not show inducement by a government agent to commit a crime, nor was Morrow's past employment by the C.I.A. in 1962 relevant to alleged entrapment by Martin in 1963. The statement by Martin that he was interested in a profit can hardly be said to have caused the commission of the crime. Finally, the issue whether an entrapment instruction should have been given was not urged in the court of appeals and thus clearly does not warrant review here.

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[4] Petitioners also claim that the court gave no proper instruction on criminal intent. The court properly charged that a conspiracy count required that a defendant act with a deliberate purpose to violate the law (2 R. 124–125) and that the substantive count required that a defendant act "deliberately" (2 R. 127). There was no exception to this instruction.

4. Petitioners, who neither objected at trial or on appeal, have no basis to complain here about the admission into evidence of post-arrest statements made by Kohly to Secret Service agents and to an assistant United States attorney (2 R. 30–34). In both instances, Kohly was advised that he could remain silent and had a right to consult an attorney; the assistant United States attorney offered him a telephone to call an attorney. The substance of Kohly's post-arrest statements was in most respects similar to the grand jury testimony that he gave seven weeks later on advice of his attorney. The failure of trial counsel to object may thus reasonably be considered to have been defense strategy framed in light of the generally exculpatory character of the statements. In any event, it is not clear that the provisions of Rule 5(a) were violated since petitioners' failure to object to the admission of the post-arrest statements deprived the trial court of an opportunity to ascertain, prior to the admission of the statements, whether Kohly's post-arrest detention was, in fact, illegal. In these circumstances, there was clearly no plain error which this Court should consider in the absence of objections below. See *United States* v. *Ladson,* 294 F. 2d 535 (C.A. 2), certiorari denied, 369 U.S. 824.

5. In the court of appeals, petitioners claimed that they were deprived of a fair and impartial proceeding by Judge Weinfeld's conduct of the trial. The court reviewed this contention and found it to be lacking in merit. In this Court, petitioners have changed the issue, claiming that the action of the

trial judge coupled with the conduct of defense counsel deprived them of the effective assistance of counsel. We submit that an examination of the record shows this assertion to be wholly unfounded. Petitioners extract instances where defense counsel was overly contentious and where Judge Weinfeld acted reasonably to control the proceedings. Counsel, however, is not constitutionally ineffective simply because the court rules against him or because he is overzealous. Petitioners have failed even to separate the remarks made outside of the presence of the jury (*e.g.*, see Tr. 20, 286, 327–329, 358, 860–862) from those made in its presence. The jury was, moreover, clearly instructed not to draw any inferences from the court's rulings (2 R. 113–114).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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